UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

LVI, INC.

and Case: 21-CA-36866

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 105, AFL-CIO

Sonia Sanchez, Atty., NLRB Region 21, Los Angeles, CA, for General Counsel.

Mario Teran, Business Representative, Glendora, CA, for Local Union No. 105.

A. Robert Rhoan, Atty., *with Lyne A. Richardson, Atty*., on the brief, (Ford & Harrison, LLP), Los Angeles, CA, for Respondent.

DECISION

Statement of the Case

WILLIAM L. SCHMIDT, Administrative Law Judge. The issues presented by this case are whether LVI, Inc. (LVI, Company, or Respondent) demoted and later terminated Jose Flores in violation of Section 8(a)(1), (3), and (4) of the National Labor Relations Act (Act).

Sheet Metal Workers International Association, Local Union No. 105 (Local 105 or Union) initiated this case by filing an unfair labor practice charge on May 20, 2005.[1] It later amended the charge on August 3. On September 30, the Regional Director issued a complaint and notice of hearing alleging that Respondent demoted Flores on February 7 and then discharged him on February 16 in order to discourage his union or concerted activities and because he gave testimony in Case 21-CA-36672. Respondent filed a timely answer denying that it engaged in the unfair labor practices alleged.

I heard this case at Los Angeles, CA, on April 3 and 4, 2006. Having now considered the entire record together with the impressions gained from observing the demeanor of the witnesses, and after considering the briefs filed by General Counsel and Respondent, I have concluded that Respondent violated the Act, as alleged, based on the following

[1] Where not shown otherwise, all dates refer to the 2005 calendar year.

Findings of Fact

I. Alleged Unfair Labor Practices

A. Credibility

Although the record contains a few innocent misstatements (and a plethora of obvious transcribing errors), there are sharp conflicts in the accounts of relevant events provided by the witnesses. Other than the findings made in Section B, which are essentially uncontested or supported by unassailable documentary evidence, the findings made in the remaining sections resulted from the conclusions I reached about the reliability of a particular account following my careful study of the record. When necessary to choose between conflicting accounts, my findings rest to a substantial degree on my assessment of the witnesses' bias, the weight of the evidence, established or admitted facts, the degree of corroboration or internal consistency in a witness' testimony, the degree to which critical testimony was rebutted, the inherent probabilities, and reasonable inferences permitted by the record. *U.S. Postal Service*, 301 NLRB 233, fn 3 (1991); *Northridge Knitting Mills*, 223 NLRB 230, 235 (1976).

Together with all those factors I have also considered, and been swayed by, the impressions gained while observing the witnesses testify. Occasionally, these impressions result from an ineffable combination of mannerisms, manner of speaking, and overall bearing that triggered an inclination by me to accept or to doubt the witness' testimony. Judge Medina once provided this summary of the process at work in the "judging of testimony":

> This judging of testimony is very like what goes on in real life. People may tell you things which may or may not influence some important decisions on your part. You consider whether the people you deal with had the capacity and the opportunity to observe or be familiar with and to remember the things they tell you about. You consider any possible interest they may have, and any bias or prejudice. You consider a person's demeanor, to use a colloquial expression, you 'size him up' when he tells you anything; you decide whether he strikes you as fair and candid or not. Then you consider the inherent believability of what he says, whether it accords with your own knowledge or experience. It is the same thing with witnesses. You ask yourself if they know what they are talking about. You watch them on the stand as they testify and note their demeanor. You decide how their testimony strikes you.

U.S. v. Foster, 9 F.R.D. 367, 388 (S.D.NY 1949). It is for this reason, presumably, that courts do not require fact finders to itemize a witness' physical characteristics when making a demeanor-based credibility resolution. See *Bloomington-Normal Seating Co. v. NLRB*, 357 F.3d 692, 695 (7th Cir. 2004).

After considering this inseparable milieu of appearance and content, I have rejected the various accounts provided by Respondent's vice president, Michael (Mike) Lavey, and its shop foreman, Gerry Silva, where they conflict with accounts of relevant events provided by Flores, and two former employees, John Henscheid and Eduardo Monroy. In general, I found Lavey and Silva's testimony about material facts filled with inconsistencies, exaggerations, and self-serving statements, delivered in a manner that sometimes struck me as intentionally misleading and, at other times, as evasive or painfully contrived. Accordingly, I have credited their testimony only where I could conclude that they testified against their own interest or where some other reliable source provided corroboration.

Silva's account of his union activities and sympathies in December 2004 and January 2005 provides a concrete example of his doubtful credibility. In the end, I found his effort to lay the union decertification effort (central to this case) entirely at Henscheid's doorstep fundamentally inconsistent and untrustworthy. Even though he claimed that he avoided getting involved in the decertification effort, he personally withdrew from his longstanding membership in Local 105 in January 2005 because he felt intensely injured and very upset by union officials who refused to allow his participation in unit affairs following his promotion to the shop foreman position. At a unit meeting with union agents on December 23, he even asked for a show of hands among employees who wanted to decertify the union. In contrast, Henscheid, a very reluctant but credible-appearing witness, disputed Silva's account and provided a convincing, detailed description about instances of direct management encouragement for the decertification process that Silva and Lavey contradicted only indirectly.[2]

Lavey's duplicity also appears here and there throughout his testimony. Most significantly, I simply lost confidence in Lavey's veracity as he awkwardly attempted to diminish Silva's role in overseeing shop operations. Thus, he first claimed to visit the shop floor seven to ten times a day but later asserted that he was out on the shop floor all the time. Apart from the fact that both Silva and Henscheid contradicted these claims by Lavey, his exaggerated assertions struck me as at odds with his testimony about his many other managerial, financial, and marketing duties. In another example, Lavey first stated forcefully that Silva disciplined employees but, by the time he finished backtracking, he sought to convey the impression that Sliva performed only minor clerical functions in preparing disciplinary documents. In addition, Lavey occasionally required considerable leading from his counsel in order to provide details about the alleged force reductions that allegedly occurred before and after Flores' layoff. Even then, his subsequent admissions on cross-examination suggested that at least one purported layoff in the drafting department, where the work process begins, may have been a voluntary separation because the employee was quickly replaced.[3]

Respondent's attacked Henscheid's credibility on the ground that he inconsistently identified the participants in a significant front office meeting where he expressed reservations about preparing an NLRB decertification document. Respondent's brief correctly notes that Henscheid first said he met with Silva, Dorazio, and Mike Lavey but, on cross-examination, he asserted that Silva, Mike Lavey and Tom Lavey had been present for this meeting. On cross examination, Respondent's counsel embedded the identity of the management participants in the question posed to Henscheid and he merely responded affirmatively. I find this variance insignificant as it appears more indicative of inattentativeness to the examiner's question rather than an attempt to deliberately mislead. In general, I found Henscheid to be a credible witness.

Respondent also attacked the credibility of Flores and Monroy, both of whom testified through an interpreter. The clarity of their testimony provided in this manner became unnecessarily problematic at times but I am not convinced that the witnesses should be faulted

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[2] Henscheid described two meetings related to the decertification matter that Silva arranged with top management held in Lavey's office. Although Lavey and Silva denied that they talked with Henscheid about the decertification effort, neither specifically denied that these two meetings occurred.

[3] Thus, Lavey claimed that the Company let Norma Ensaldo, a drafting department employee, go due to the lack of work. Later, Lavey admitted that LVI hired Douglas McKinn as a draftsman. GC Exhibit 4 shows that Ensaldo's "termination" occurred on March 3 and that LVI hired McKinn's on March 14 at the same hourly rate Ensaldo received.

for those difficulties. Overall, I have credited Flores and Monroy as both impressed me by their effort to render a truthful account without undue embellishment.

B. Facts

1. LVI Operations and Personnel

LVI, a corporation with a place of business located in City of Industry, California, fabricates custom-made, stainless steel kitchen equipment for restaurants, hotels, casinos, and schools.[4] Its president, Ronald Dorazio, and its vice president, Lavey, manage Company operations with the help of shop foreman Silva. The Company employed approximately 17 other workers at relevant times. Nearly all worked on a shift that ran from 7 a.m. to 3:30 p.m. Most of the production shop workers are Spanish speaking persons.

Local 105 represents LVI's shop employees. The unit includes layout employees, layout assemblers, assemblers, fabricators, welders, press brake operators, notchers (including shear machine operators and cutters), helpers, tools/stockroom employees, and craters but it excludes supervisors.[5] Historically, LVI has executed the collective bargaining agreement Local 105 negotiates with the Food Service Metal Products Association. The current agreement (effective from January 1, 2005, through December 31, 2008) reflects that Respondent executed it on December 27, 2004. In fact, LVI did not execute it until mid-to-late January 2005. This agreement succeeded a two-year agreement in effect through December 2004.

After a contractor or dealer awards a contract to LVI, certain unspecified employees make field measurements and submits those along with architectural drawings provided by the contractor to LVI's drafting department. The drafting department prepares shop drawings for use in fabricating the equipment that are submitted to the contractor or dealer for approval. Following approval of the shop drawings by the customer's representative, Lavey gives them to Silva along with a projected delivery date. Silva carefully reviews the drawings to familiarize himself with the project and to prepare requisitions for any materials needed to complete the job. He then instructs the lead layout employee about the project and that employee will either do the layout work himself or pass it along to another layout employee.

Using the shop drawings, the layout employee draws or sketches a pattern onto the metal used for the product. When the layout is complete, the metal sheets are taken to the notching department where those workers make various cuts to accommodate bending the stainless steel sheets as well as cut-outs required in the surface of the object being fabricated. From notching the product moves on to the press brake were the metal is formed into individual sizes and rolls, square breaks, and the like. Thereafter, the formed pieces go to the fabrication department for assembly. When the assembly is completed, workers in the finishing department clean the item and otherwise prepare it for delivery and installation. Until two or three years ago, LVI employed an outside installation crew but it now subcontracts that work.

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[4] Respondent's answer admits that in the 12-month period prior to the filing of the charge it had gross revenues in excess of $500,000, and that purchased and received goods valued in excess of $50,000 either directly from points outside California or from enterprises in California each of which received these goods directly from locations outside California.

[5] Joint Exhibit 2: Appendix A (The 2005–08 collective bargaining agreement) Addendum No. 1, Section 1, of the agreement excludes Section 2(11) supervisors from the unit.

Work in the shop tends to slow down during the winter holiday season, roughly November to February. But based on the timing of orders placed with the Company recently, the basis for this seasonal slowdown does not appear to be consistent. See General Counsel Exhibit 5. Thus, the table below reflects the Company's work orders for 2004 and 2005 on a calendar quarterly basis:

2004	2005
1st Qtr. 141	1st Qtr. 168
2nd Qtr. 128	2nd Qtr. 171
3rd Qtr. 103	3rd Qtr. 207
4th Qtr. 145	4th Qtr. 144

Thus, of the eight quarters depicted in the above table, the four quarters with the heaviest order volume commenced with the 4th quarter of 2004.

The record provides no basis for assessing the complexity or the income-producing features of the work orders received by LVI in 2004 and 2005. However, The Cheesecake Factory, a restaurant chain, wound up its work with LVI in 2004 and began ordering its equipment from a competitor in Texas. Lavey portrayed this client as one of LVI's major customers. General Counsel Exhibit 5 shows that this chain's agent placed 10 orders with LVI in the first quarter of 2004, 17 orders in the second quarter and 3 orders in the third quarter, including the order of October 6, 2004, the last from that client. Based on the cryptic description provided in the exhibit, and the short period of time between the date of the work order and the date of the invoice, several of the 2004 orders from this source may have been quite small.

Layoffs of any significant duration resulting from the lack of work have not been common. The last major layoff occurred in the early 1990's when a lack of business forced LVI to layoff nearly its entire shop crew. More recently, slow periods have resulted brief layoffs for a few employees that ranged in length from half-a-day to two days, or so. Silva generally makes every effort to keep the shop crew busy during a down time by assigning them minor machinery repair, clean up, and other similar maintenance tasks. As illustrated by the following table, the size of the shop crew remained relatively stable during 2004 and 2005.[6]

2004 Separations	2004 Hires
1st Qtr. 6	1st Qtr. 5
2nd Qtr. 4	2nd Qtr. 2
3rd Qtr. 1	3rd Qtr. 7
4th Qtr. 1	4th Qtr. 0
2005 Separations	**2005 Hires**
1st Qtr. 2	1st Qtr. 1
2nd Qtr. 5	2nd Qtr. 4
3rd Qtr. 8	3rd Qtr. 5
4th Qtr. 1	4th Qtr. 5

[6] I compiled this table from General Counsel Exhibit 4. The basis for nearly all of the separations listed is not known. One employee was hired and separated on the same date in the third quarter of 2005.

2. Silva's Status

The General Counsel's case depicts Silva as the primary force behind the decertification effort described later. Respondent denied that Silva is its supervisor and agent within the meaning of the Act. Mike Lavey claimed that he supervises the shop operation. [7]

Silva started his employment with LVI as a metal finisher in April 1997. Between that time and 2002, he received promotions through various unit positions. In March 2002, LVI promoted him to the shop foreman position. Silva belonged to Local 105 when LVI hired him and he kept his membership active until he took a withdrawal card in January 2005. Silva along with Dorazio and Lavey are the only salaried employees at LVI. Silva's salary level translates into an hourly pay rate of $30.74, well above that of most other shop employees and just below that of Dorazio and Lavey. As the shop foreman, Silva is furnished an office which is situated between the notching and layout areas of the shop floor. Silva attends the front office management meetings when they are held and Lavey characterized him as "my voice in the shop."

Silva oversees the entire fabrication process. His main responsibility is to make sure that jobs get done on time, loaded for shipment and delivered to the customer. On a daily basis Silva opens the shop and walks throughout the area inspecting for clutter in the aisles and checking the current status of jobs. Later, provides Dorazio and Lavey with a job status report "so they can deal with their customers if they call." After his morning walk-through, Silva reviews the previous day's time cards to "make sure the proper job codes have been entered" so the bookkeeper "doesn't have to sit there and try to figure out what [the shop employees] worked on." During the remainder of the day, he oversees the progress of the shop's work to ensure the various projects are completed in a timely manner. To this end, Silva occasionally reorders the priority of projects in a particular department, assigns a worker to assist in another department, or directs a worker to correct defective work.

Silva told Henscheid that he had the authority to hire and discharge employees and Henscheid observed Silva talking with persons in his office who later began working at the shop. Similarly, Silva alone notifies shop workers when they are laid off or discharged.[8] Most, if not all, shop employees submit their requests for vacation or time off to Silva. In some instances, Silva granted such requests on the spot; in other instances he has notified the employee later as to whether the request has been granted or denied. Silva relays virtually all communications from the front office management to the shop floor workers. Lavey's testimony to the effect that he almost never speaks to the shop workers corroborates Henscheid claim that Silva assigns and directs the shop work unless he is absent from work.

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[7] I do not credit Lavey's assertions that he directly supervises shop operations on a daily basis. Entirely aside from his inconsistent and unsupported testimony about the frequency of his presence on the shop floor, he admittedly performs numerous other administrative, customer service, sales, and financial functions.

[8] Unlike Dorazio and Lavey, Silva speaks Spanish fluently. He has interviewed most of the applicants for shop jobs since he became foreman. However, Silva asserted that Lavey makes the decision to hire an applicant after he reports the content of his interview. Silva denied that possesses authority to discipline, suspend, layoff, promote, hire, discharge, assign work, reward employees for their work or grant time off, or to effectively recommend such actions. In effect, Silva asserted that he merely collects information pertaining to these personnel actions and passes it along to Lavey for his consideration, or that he carries out personnel actions as directed by Lavey.

3. The Decertification Effort and the Unfair Labor Practice Charge

In November and December 2004, Silva, Henscheid, and LVI's shipping and receiving clerk, Steve Combs, frequently ate lunch together. During this period, they often discussed their dissatisfaction with the high cost of the union dues and the contractual medical insurance. On one occasion during this period, Lavey told Silva and Henscheid that the Company could offer the employees a better package if they went non-union. Eventually, Silva, Henscheid and Combs began to discuss getting rid of the Union. In early December, Silva told Henscheid he could get the forms to initiate a NLRB decertification (RD) proceeding on the internet. A short while later, Silva gave Henscheid a RD petition form and asked him to fill it out.

Union agent Mario Teran met with unit employees at LVI on December 23, 2004, during their lunch hour. Teran talked with the workers about the status of the on-going contract negotiations. Silva attended and spoke out forcefully particularly about union dues. When Teran said that the union could work with the employees if their problem was with the union dues, Silva interrupted to ask for a show of hands by employees who preferred to be non-union if the union official did not work with them concerning the dues. Luther Medina, another Union agent who accompanied Teran, told Silva that he could not participate in the meeting as he had become a supervisor. Medina's stance fueled Silva's dissatisfaction with the union even more. Silva testified, "I was told by the union reps, that I had, you know, I had no position in the union. And I felt that I was paying union dues that I wasn't getting representation so why pay this money."

Toward the end of the year Silva asked Henscheid about the decertification form. Henscheid told him that he felt uncomfortable about the form without some assurance that the Company would back him up. Shortly thereafter, Silva asked Henscheid to meet with Lavey and Dorazio in Lavey's office. During this meeting, Henscheid reiterated his "concerns" about filling out the decertification forms but Lavey and Dorazio reassured him that he had nothing to worry about because they would support him 100%.

Flores returned to work on January 3, 2005, from a two-week vacation. As he was about to clock in, Silva approached and told Flores that he did not know what was going to happen him because he thought the shop was going to go non-union. Silva explained that he spoke to Flores because they both had the same union pension and he knew the union would not permit any of its members to work in a non-union shop. Flores told Silva that he had heard nothing about the shop going non-union and that he would check into it with Local 105.

Despite management reassurances, Henscheid still did not fill out the RD petition promptly. A couple of days after the meeting in Lavey's office, Silva approached Henscheid's layout bench asked about the RD petition again. When Henscheid confessed that he still had not completed it, Silva told him to do so because he wanted to get it moving along. Finally, Henscheid completed the RD petition form and put it on Silva's desk. He never saw it again.

On that same day Steve Combs solicited employee signatures on a petition seeking to get rid of Local 105. When he approached Flores and Eduardo Monroy, Flores' helper at the time, in the press brake department (apparently on work time) he told the two workers that Silva said to sign the petition. Flores refused but Monroy signed it. By the time Combs came to Henscheid with the petition, eight or ten employees had already signed it. Henscheid added his signature to Combs' petition form. Later that day, Silva told Henscheid that Flores had not signed the petition and that the Company would get rid of those employees who did not sign it. The RD petition (Case 21-RD-2788) reflects that it was filed on January 4. Combs later told Henscheid that he filed the RD petition with the NLRB.

After the RD petition had been filed, Local 105's business agent Teran called Henscheid seeking to meet with employees at a nearby pizza parlor following work. Teran told Henscheid that he did not want management to know about the meeting. Henscheid, who did not attend the meeting, asked another employee named Fernando to tell the other employees about it.

Silva spoke to Henscheid at his layout bench about 9 a.m. on the day after the union meeting. He told Henscheid that Combs had gone to the meeting and had told him that Flores and Antonio Lopez also attended the meeting.[9] Silva remarked to Henscheid that the owners would get rid of the people who attended the meeting. By the first week of May, the three of the four employees who attended the mid-January union meeting, Flores, Lopez, and Monroy, no longer worked for LVI.

Monroy also attended the union meeting. On several occasions later in January, Silva told Monroy that they did not need a union and questioned him about his reasons for wanting a union. In addition, Silva began badgering Flores and Monroy when he walked past their department. He mentioned several times that the union insurance and dues were too high. Toward the end of January, Silva simply remarked "Fuck the Union" when he passed by Flores and Monroy's work area.

On January 11, Local 105 filed an unfair labor practice charge in Case 21-CA-36672 alleging that Silva unlawfully interrogated, polled, and intimidated employees under his supervision into expressing dissatisfaction with representation which led to the filing of the decertification petition.[10] About a week later, Jessica Toton, an NLRB Region 21 field examiner, made an appointment to interview Henscheid concerning the Union's charge on February 4 at the regional office. Toton also arranged to interview Flores at the regional office on February 1. Later, Flores told Henscheid about his pending appointment with Toton. Near the end of January, Henscheid told Silva about that Toton's appointment to interview Flores and also mentioned that he too had an interview appointment with her. Silva told Henscheid that if he kept the appointment he "would be going against the company." Then Silva warned, "You know how these people are[,] . . . [t]hey'll let you go."

After thinking it over, Henscheid became fearful that he might lose his job if he went to the Toton interview so he decided against doing so. On February 3, Henscheid again met with Silva, Lavey, and Dorazio, in Lavey's office and told them the he decided that he would not meet with Toton. The next day, a Friday, Henscheid learned from Flores that he had kept his appointment with Toton and he passed along this information to Silva. Later that day, Silva told Flores that he knew he had met with the NLRB and that Henscheid had an appointment but he was not going to keep it.[11]

4. Flores' Reassignment and Layoff

Prior to his layoff in mid-February 2005, Flores continuous tenure at LVI exceeded that of any other manager or employee. Flores worked as LVI's sole press brake operator for 15

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[9] Purportedly, Combs complained a lot about Silva and told the union agents that Silva did not want the union. Henscheid admitted that both he and Combs, in effect, kept Silva informed about the union matters throughout this period.

[10] At the hearing, Counsel for the General Counsel represented that Respondent had settled this unfair labor practice case.

[11] Silva and Lavey both claimed that they lacked knowledge of Flores' participation in the NLRB investigation. I do not credit their claims.

years. Before that, he had worked as a press brake operator for several other industry employers. All together, Flores had accumulated 29 years of operator experience. As a result, Flores had become a very skilled and accurate operator.

The duties specified in the current collective bargaining agreement provides that, in addition to operating the machine, the press brake operator must set all dies (which weigh anywhere from a few pounds to more than 300 pounds) and gauges, check materials, read blue prints, check the finished work coming off the press brake, make minor repairs to the dies and the machine, and instruct assigned helpers. Jt. Exhibit 2: Addendum No. 1, Section 3(f). The hourly rates in the new agreement provides for an operator pay floor that ranges from $13.30 to $18.05 per hour. Flores earned $21.09 per hour at the time of his layoff.

The Company employed Monroy in February 2003, as Flores' helper in the press brake department. After Monroy worked the helper's job for about a year, Flores voluntarily began training Monroy as an operator for an hour or so during slack periods. From mid-2004 onward, Monroy would operate the press brake two or three times a week. On these occasions, Flores worked as the helper while providing instruction to Monroy. At the end of 2004, Monroy served as the substitute operator during Flores' two week vacation. Between January 3 when Flores returned from vacation and the second week of February, Monroy operated the press brake for limited periods on two or three additional occasions.

At about 10 a.m. on February 7, Silva spoke briefly with Flores and Monroy in the press brake area. Silva told Flores that he wanted Monroy to operate the press break everyday after the lunch period, i.e., from 12:30 to 3:30 p.m., and that Flores would work as the helper. Silva provided the two workers no explanation for this reassignment.[12] No changes in Flores' pay or benefits occurred. Apart from the fact that the operator ordinarily has far greater skill and knowledge than the helper, the evidence is insufficient to conclude that one job is more physically strenuous than the other. Regardless, the two press brake employees switched jobs each day after lunch for the next ten days.

Around 3 p.m. on February 16, one of Flores' co-workers, Jose Luis Navarro, came to the press brake department and told Flores that Silva wanted to see him in the office. When he went to the foreman's office, Silva told him that work was slow because some clients had canceled work orders so he was being laid off for two weeks. Flores asked whether he should apply for unemployment Silva told him go ahead. No others were laid off at this time.[13]

The following morning Silva told Henscheid that he had let Flores go. After Flores' layoff, Monroy became the press brake operator on a full-time basis and another worker named Javier became his helper. When Flores came to the shop to pick up his tools on Friday,

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[12] However, Silva testified that he made this change at Flores request. According to Silva, after Flores returned from his vacation, he asked if Monroy could run the press break "a certain part of the day" because he was being treated by his cousin, a chiropractor, for "a lot of back pain." When Silva supposedly sought and received Lavey's approval for this change, Lavey told Silva that Flores earlier asked to finish his career as a notcher because it was easier work. I do not credit Silva's explanation for Flores' reassignment particularly where, as here, Flores credibly denied that he requested it because of back pain.

[13] Lavey testified that he made the decision to let Flores go and told Silva to handle the matter at the end of the work day. Silva said he also let Navarro go that same day and then instructed him to send Flores to his office. However, the LVI pay record shows that Navarro was still employed at the time of the hearing. General Counsel Exhibit 4: 4.

February 18, he observed Monroy operating the press brake. Henscheid also observed Monroy regularly operating the press brake machines. From what Henscheid observed, Monroy needed much more experience operating the brake press. In his judgment, Monroy was not nearly as proficient as Flores on the press brake because he was much slower and not as accurate. Monroy continued to operate the press brake until his termination on May 2.

C. The Contentions

Counsel for the General Counsel argues that Respondent demoted and then terminated Flores because he refused to support the decertification campaign promoted by Silva with the active support of higher management. She contends that Flores demonstrated his support for continued representation by Local 105 by attending the semi-secret union meeting in mid-January and by providing a statement to the NLRB in support of Local 105's unfair labor practice charge attacking the validity of the RD petition Silva had generated. Counsel for General Counsel argues that Respondent is responsible for Silva's conduct because he is a Section 2(11) supervisor or LVI's agent within the meaning of Section 2(13). And, in the General Counsel's view, Respondent's claim that it laid Flores off due to a lack of business is a pretext advanced to mask its unlawful motives.

Respondent argues that it cannot be charged with Silva's conduct because he is not a supervisor.[14] Respondent further contends that the General Counsel failed to meet the burden of persuasion required under *Wright Line*. However, assuming that General Counsel met that burden, Respondent argues that it switched Flores from a brake operator job to a helper's job in the afternoons as an accommodation because of pain he suffered while operating the press brake and that, in any event, no adverse action occurred. Finally, Respondent argues that it laid Flores off due to the lack of work resulting from a downturn in business.

D. Analysis

1. Silva's Status

Under the Act, an employer is responsible for the actions and statements of persons acting as its agents.[15] The existence of an agency relationship under the Act is a fact question. *Overnight Transportation Co. v. NLRB*, 260 F.3d 259, 265-66 (DC Cir. 1998). However, Section 2(13) of the Act provides that in "determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." In cases where there is no express authorization by the principal, the Board examines whether the alleged agent acted with the principal's "apparent authority." The Board applies the common law principles of agency in determining whether an individual is acting with apparent authority on behalf of the employer when that individual makes a particular statement or takes a particular action. *Cooper Industries*, 328 NLRB 145 (1999). The Board recently summarized the principles applicable in such situations.

> Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question. *Southern Bag Corp.,* 315 NLRB 725 (1994) (and cases cited

[14] Respondent makes no argument concerning the claim that Silva is its statutory agent.

[15] Section 2(2) provides that "the term 'employer' includes any person acting as an agent of an employer."

> therein). Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such a belief. *Service Employees Local 87 (West Bay Maintenance),* 291 NLRB 82 (1988) (citing Restatement 2d, Agency, § 27 (1958, Comment a)).
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> The Board's test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management. *Waterbed World,* 286 NLRB at 426–427 (and cases cited therein). The Board considers the position and duties of the employee in addition to the context in which the behavior occurred. *Jules V. Lane,* 262 NLRB 118, 119 (1982).

Pan-Oston Co., 336 NLRB 305, 306 (2001). In short, the Board finds apparent authority exists when the individual is placed "in a position where employees could reasonably believe that he spoke on behalf of management.". *Progressive Electric v. NLRB*, 453 F.3d 538 (DC Cir. 2006).

LVI placed Silva in just such a position and, therefore, it is responsible for his conduct because he regularly acts as its agent when dealing with shop employees.[16] Numerous secondary indicia point toward Silva's status as an agent of LVI. Silva's title connotes a level of authority above other unit employees and his salaried pay plan indicates his close alignment with management. After he withdrew from the union in January 2005, Silva told Henscheid that Lavey advised him against working further with the tools of the trade because managers are not permitted to do that. In addition, LVI provides Silva with an office on the shop floor where he can be observed interviewing Spanish speaking applicants, and otherwise conducting shop business, such as studying shop prints, preparing material requisitions, and reviewing employee time cards. Silva also conducts private conferences with employees in his office to, among other things, inform them of a layoff or dismissal.

Silva's primary responsibilities also demonstrate his apparent authority. He alone informs employees about established job priorities and deadlines, and occasionally directs employees to perform particular tasks ahead of others in order to meet deadlines. Silva occasionally instructs employees to perform tasks that are not a part of their usual job routine. As Silva relays virtually all management directives to the shop employees, an ample basis exists to conclude that Silva's speaks for higher management on all of these occasions. The fact that employees submit requests for time off, pay increases, and supplemental job assignments directly to Silva shows that they perceive Silva to be vested with management authority. And his apparent authority is reinforced by the fact that employees always get their response to these and other work issues from Silva regardless of who actually makes the decision. Lavey's practice of using Silva as his "voice in the shop" confirms his intent that employees should look upon Silva as speaking for him at all times. For these reasons, I find that Silva acts as Respondent's agent in dealing with the shop workers and that it is, therefore, responsible for his conduct.

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[16] Where the parties have included a supervisor in the bargaining unit, the Board normally will not attribute a supervisor's conduct to the employer absent evidence that the employer encouraged, authorized or ratified the supervisor's conduct. See e.g., *Food Mart Eureka*, 323 NLRB 1288, fn. 1 (1997), and the cases cited there. That principle does not apply here for two reasons. First, the parties have never included supervisors in the unit and a union agent, believing Silva had become a supervisor, objected to his participation in the December 23, 2004 unit meeting. In addition, Lavey encouraged and ratified Silva's decertification efforts.

In view of this conclusion, I find it unnecessary to consider whether he was also a supervisor within the meaning of the Act.

2. Flores Demotion and Termination

Section 8(a)(3) prohibits an employer from discriminating against an employee in order to encourage or discourage union membership. Section 8(a)(4) prohibits an employer from discharging or otherwise discriminating against an employee for filing charges or giving testimony under the Act.

An employer violates 8(a)(3) by taking adverse action against an employee because the employee engages in, or is suspected of engaging in, union activities. *Equitable Resources*, 307 NLRB 730, 731 (1992). An employer violates 8(a)(4) by taking adverse action against an employee for furnishing information to the NLRB in an unfair labor practice case. *NLRB v. Scrivener*, 405 U.S. 117 (1972). (Supreme Court held 8(a)(4) applicable where the discharged employee provided an affidavit to an NLRB field examiner investigating an unfair labor practice charge even though the employee had not filed the charge or testified at a formal hearing.)

In *Wright Line*,[17] the Board adopted a causation test for use in analyzing 8(a)(3) discrimination cases. The Board applies the same causation test in 8(a)(4) cases. *Operating Engineers, Local 302*, 299 NLRB 245 (1990). Under *Wright Line*, the General Counsel has the initial evidentiary burden of establishing that: (1) the employee against whom an adverse action was taken engaged in protected activity; (2) the employer knew of the protected activity; and (3) the employer demonstrated animus toward the employee's protected activity. If the General Counsel makes a showing of discriminatory motivation, the burden of persuasion shifts to the employer to demonstrate that the same action would have occurred even in the absence of the protected conduct. *North Carolina License Plate Agency #18*, 346 NLRB No. 30 (2006).

As noted above, I do not credit Silva's assertion that he made the February 7 job switch as an accommodation to Flores. It occurred more than a month after Flores returned from vacation and supposedly requested an accommodation for health reasons. Instead, its actual timing makes the inference almost inescapable that Silva ordered it to retaliate against Flores immediately after learning that this long-term employee assisted Local 105 by cooperating in the NLRB's investigation of its unfair labor practice charge. Although it is true that Flores suffered no immediate loss of pay and benefits, I am satisfied that the February 7 reassignment also occurred in anticipation of the layoff that took place ten days later. But even absent any change in pay and benefits, this involuntary reassignment would have a strong tendency to humiliate a long-term, skilled craftsman such as Flores around his co-workers. Accordingly, I reject Respondent's argument that Flores suffered no adverse action when Silva ordered the afternoon job change on February 7.

In my judgment, the General Counsel made a solid showing of all elements required to meet the initial *Wright Line* burden under 8(a)(3) and (4). Local 105's unfair labor practice charge in 21-CA-36672 attacked Silva and the decertification process that he initiated and nurtured with support and encouragement from Dorazio and Lavey. Flores openly supported Local 105 and refused to go along with Silva's decertification scheme. And as just noted, he supported Local 105's unfair labor practice charge by cooperating with the NLRB investigation.

[17] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Silva knew generally of Flores' support for Local 105 all along and, from information provided by Henscheid, he also knew of Flores' had met with the NLRB investigator. Silva also knew that Flores was one of the few employees who attended the post-petition meeting called by Local 105.

Silva's conduct as well as Lavey's support of his decertification effort establishes the requisite hostility toward Local 105's representation of employees and the longstanding collective bargaining relationship at the shop. In addition, Silva's warnings that employees who attended the semi-secret union meeting in January, or who cooperated with the NLRB investigator, would be let go because they would be "going against the company" provides ample evidence of Respondent's hostility toward Local 105 sympathizers.

Other factors establish a strong causal nexus between Flores' union sympathies, including his assistance with the NLRB's investigation of Local 105's unfair labor practice charge, and Respondent's adverse actions against him. As earlier noted the timing of the adverse actions strongly suggest an unlawful motive at work. Only a weekend elapsed between the time Silva learned that Flores actually met with the NLRB investigator and his involuntary reassignment to the helper position on February 7. Moreover, only Flores, Respondent's most senior employee, suffered an impact from the alleged order cancellations Silva alluded to when he laid Flores off.[18] In addition, the alleged lack of work for a brake press operator is belied by the fact that Monroy replaced Flores on a full-time basis after February 16 and worked eight hours a day in that position until Silva also fired him three months later. Hence, in the absence of a strong affirmative defense, these factors merit the conclusion that Respondent violated Section 8(a)(1), (3) and (4), as alleged, by the partial reassignment of Flores on February 7 and by letting him go ten days later.

To meet its *Wright Line* burden "an employer cannot simply present a legitimate reason for its action *but must persuade by a preponderance of the evidence* that the same action would have taken place even in the absence of the protected conduct." *Roure Bertrand Dupont, Inc.,* 271 NLRB 443 (1984). (Emphasis mine) Respondent has not made a persuasive case at all.

Although Lavey and Silva asserted that the lack of work dictated Flores's layoff, no other employees were similarly affected around the same time. Plenty of press brake work existed. Respondent, in effect, replaced Flores with Monroy at least for three months to perform that work.[19] Although Silva alluded to order cancellations at the time of Flores layoff, Respondent failed to identify the customer or customers who purportedly cancelled orders or to explain why these particular cancellations necessitated the layoff of a long-term, highly-skilled employee.

Moreover, the only business records in evidence were introduced by the General Counsel and, far from establishing that the loss of orders from The Cheesecake Factory resulted in a lack of shop work as Lavey and Silva claimed, these records actually show an year-long uptick in the number of orders beginning with the fourth quarter of 2004. The Company's payroll record also shows a relatively stable work force throughout 2004 and 2005.

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[18] Norma Ensalda, a non-unit draftsperson left Respondent's employ two weeks after Flores' layoff. No other employees left LVI in the first quarter of 2005 for any reason. But as previously noted, Respondent hired Douglas McKinn as a draftsman a week after Ensalda left.

[19] Sliva claims that he twice offered Flores part-time work shortly after the February 16 layoff. Even assuming they occurred, I would find the offers were made in bad faith because Monroy's continued to work full-time at Flores' old job throughout that period.

Even setting aside the fact that I regard Lavey's claims that the Company let five other employees go for lack of work in the period from October 2004 through April 2005 as factually suspect, the Company's personnel record (General Counsel Exhibit 4) shows that it hired 13 new employees in the last two quarters of 2004 and the first two quarters of 2005. That strikes me as wholly inconsistent with assertions that the departure of the Cheesecake Factory work resulted in serious belt tightening. On the contrary, LVI's hiring record strikes me as completely consistent with the large number of orders it received in the year-long period commencing with the 4th quarter of 2004.

Respondent has rested it case almost entirely on the testimony of two agents whose veracity is, at best, highly doubtful. Unquestionably, more detailed business records exist which would either refute or support the inferences I have drawn from those the General Counsel introduced. Respondent's failure to bring forward any other records that would support the testimony of its witnesses and refute the inferences obviously available from those introduced by the General Counsel merits the inference that those other records also would not support the its position. *Interstate Circuit, Inc. v. U.S.*, 306 U.S. 208 (1939) (where weak evidence is offered when strong evidence is available, the inference that the strong evidence would contradict the party's claim is warranted.) Put simply, Respondent's defense amounts to nothing more than vague assertions by Lavey and Silva that Flores' layoff resulted from a downturn in business. I find that their bare assertions insufficient to overcome the General Counsel's very strong case. In my judgment, Respondent failed to carry its *Wright Line* burden of persuasion.

Conclusions of Law

1. Respondent is an employer engaged in commerce or an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 105 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1), (3) and (4) by reassigning Jose Flores to a helper position for a portion of his work day commencing on February 7, 2005, and then by permanently laying him off on February 16, 2005.

4. Respondent unfair labor practices specified in 3, above, affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Remedy

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist, and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent must offer Jose Flores reinstatement to his former position, or if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and benefits, and make him whole for any loss of earnings and other benefits. Backpay should be computed on a quarterly basis from the date of his termination to the date of an appropriate offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). If contributions are required for any benefit trust account on Flores' behalf, they shall be calculated in accord with *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

Respondent must further expunge from its records any reference to Flores' reassignment and layoff in February 2005, and notify him in writing that such action has been taken and that any evidence related to his reassignment and layoff will not be considered in any future personnel action affecting him. *Sterling Sugars, Inc*., 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, LVI, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Involuntarily reassigning, laying off, or otherwise discriminating against its employees because of their activities on behalf of Sheet Metal Workers International Association, Local Union No. 105, or because they give testimony under the National Labor Relations Act.

b. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. Within 14 days from the date of this Order, offer Jose Flores full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

b. Make Jose Flores whole for any loss of earnings and benefits suffered as a result of his reassignment and layoff in February 2005 together with interest as specified in the in the remedy section of this decision.

c. Within 14 days from the date of this Order, remove from its files any reference to the Jose Flores' reassignment and layoff in February 2005, and within 3 days thereafter notify him in writing that this has been done and that his February 2005 reassignment and layoff will not be used against him in any way.

d. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the backpay due under the terms of this Order.

e. Within 14 days after service by the Region, post at its office and place of business in City of Industry, California, copies of the attached notice marked "Appendix." If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading

[20] If no party files exceptions as provided by Section 102.46 of the Board's Rules and Regulations, the Board, as provided in Section 102.48 of the Rules, will adopt these findings, conclusions, and recommended Order, and all objections to them shall be deemed waived for all purposes. I hereby deny any pending motions inconsistent with this Decision and recommended Order.

"POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD." Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or ceased its operations at City of Industry, California, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 7, 2005.

f. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C., September 12, 2006.

_____
William L. Schmidt
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT involuntarily reassign, layoff or otherwise discriminate against our employees because of their activities on behalf of Sheet Metal Workers International Association, Local Union No. 105, or because they give testimony under the National Labor Relations Act.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce you because you exercise rights guaranteed by Section 7.

WE WILL, within 14 days from the date of the NLRB's Order in this case, offer Jose Flores full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job.

WE WILL make Jose Flores whole with interest for any loss of earnings and benefits he suffered as a result of his reassignment and layoff in February 2005.

WE WILL, within 14 days of the NLRB's order, remove from our files any reference to Jose Flores' reassignment and layoff in February 2005 and, within 3 days thereafter, **WE WILL** notify him in writing that this has been done and that his discharge will not be used against him in any way.

LVI, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

915 2nd Avenue, Federal Building, Room 2948, Seattle, WA 98174-1078
(206) 220-6300, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (206) 220-6284.